No. 17-9572

In The
Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Mississippi

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. The State's brief mischaracterizes Flowers' positions and misrepresents the factual record 1

II. Like the Mississippi Supreme Court below, the State has failed to engage with the most salient facts demonstrating Evans' intent to discriminate 4

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Batson v. Kentucky, 476 U.S. 79 (1986) 1, 4, 7

Miller-El v. Dretke, 545 U.S. 231 (2005) 2, 6

Snyder v. Louisiana, 552 U.S. 472 (2008) 3

ARGUMENT

I. The State's brief mischaracterizes Flowers' positions and misrepresents the factual record.

The State repeatedly attributes to Flowers a position that he has explicitly disavowed. According to the State, Flowers asks this Court "to automatically assume the district attorney violated *Batson* [*v. Kentucky*, 476 U.S. 79 (1986),] based on his previous violation of *Batson* in Flowers' third trial. . . ." *See, e.g.*, Resp. Br. 21. Not so. Flowers' opening brief clearly states: "To be sure, Evans' past discrimination does not by itself prove either present discrimination or categorical unfitness to participate in jury selection, nor does it modify the allocation of the burden of proof at *Batson*'s third step." Pet. Br. 42.

The State accuses Flowers of "mischaracteriz[ing] the 'numbers' with regard to the prosecution's strikes as the district attorney struck five (5) of the available eighteen (18) African-American jurors remaining, as opposed to five (5) out of six (6), as the Petitioner suggests." Resp. Br. 17. Not so. Evans accepted one black panelist and struck the next five; then all twelve seats on the jury were filled before he *could* strike any more black panelists.[1] The presence of a dozen additional black panelists who were *qualified* for jury service is irrelevant because Evans had no opportunity to strike

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[1] *See* J.A. 208 (trial court states, "And I believe that gives us twelve, if I'm counting right.").

them. What matters is the five-out-of-six rate at which Evans struck black panelists presented to him.[2]

The State's brief supplements Evans' stated reasons for striking black panelists with arguments Evans did not provide. Resp. Br. 30 (arguing that one reason supporting the strike of black panelist Carolyn Wright was her questionnaire response that she served as a juror in a criminal case); Resp. Br. 38 (arguing that Edith Burnside's equivocation on whether she could impose the death penalty supported Evans' strike against her); Resp. Br. 42 (quoting the trial court's accurate description of Flancie Jones' distant familial connection to Flowers rather than Evans' false statement that Flowers was Jones' "nephew"). These hypothesized reasons—which the State fails to acknowledge are not Evans'—are irrelevant. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

The State purports to quote panelists when actually quoting Evans' characterizations of their responses. For the most part, these misleading attributions do not much matter; they only gild the lily.[3] However, the

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[2] Both the trial court and the Mississippi Supreme Court calculated the strike rate as Flowers has done, five out of six. J.A. 209; 372.

[3] For example, Dianne Copper did not, as the State claims, "state 'that she leaned toward favoring [Flowers'] side of the case.'" Resp. Br. 9-10. What she did say when asked if she thought "it may cause you to lean toward the defendant in the case" was "It's possible." J.A. 190. The State goes even further in its claim that Flancie Jones "was twice late to court, stating she didn't like

substitution of Evans' words for those of Edith Burnside is both disingenuous and significant. The State twice asserts that "Edith Burnside stated that Flowers was 'very good friends with both of her sons.'" Resp. Br. 9; 28. It claims that "Ms. Burnside stated the 'fact that she knew the Defendant so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case.'" *Id.* The State's supporting J.A. citations are not to Burnside's *voir dire*, but to Evans' stated reasons for striking her. Burnside herself said that her sons and Flowers "played ball and stuff," and when asked whether that connection would affect her decision, she replied without qualification, "No." J.A. 80-81.

The State asserts that deference is due a trial court's demeanor determinations. Resp. Br. 13-14. But Flowers' trial judge made no determinations based upon demeanor. *Compare Snyder v. Louisiana*, 552 U.S. 472, 479 (2008):

> [D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a

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to get up in the morning." Resp. Br. 42 (citing Tr. 1786). It is true that Jones was late twice, but no one—not Jones, not Evans—"stat[ed] she didn't like to get up in the morning." Jones explained during *voir dire* that it was difficult for her to get up because she was coming off of the night shift, J.A. 180; Evans noted during the *Batson* hearing that "[s]he was late two different times," J.A. 229, but did not comment on Jones' explanation.

> determination concerning Mr. Brooks' demeanor.

Moreover, unlike Snyder's prosecutor, Evans made no assertions about demeanor, making it even less likely that the trial court's decision rested upon it.

II. Like the Mississippi Supreme Court below, the State has failed to engage with the most salient facts demonstrating Evans' intent to discriminate.

The State credits the Mississippi Supreme Court for acknowledging that *Batson* "demands a sensitive inquiry into such circumstantial evidence of intent as may be available." Resp. Br. 24-25 (quoting J.A. 372). Then, like the state court below, it assiduously ignores both the existence and import of the most salient facts in the record.

With respect to Evans' history of striking 41 of 43 black panelists, and his two adjudicated *Batson* violations at prior trials, the State vaguely allows that history "is a circumstance to be considered," Resp. Br. 20, but never suggests what significance, if any, it should have. If the remainder of its brief is a guide, the State's answer (like the state courts') is "none." Apart from insisting that both state courts "clearly considered" it because Flowers' trial counsel *argued* it, *id.* at 20-21,[4] the

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[4] Flowers demonstrated at pp. 35-36 of his opening brief both that this logic simply does not hold, and that the record excerpts relied upon by the state court do not support the proposition for

State's only other use for Evans' history is as the subject of the straw man argument refuted *supra*. Evans' history makes its final appearance on p. 21 of the State's brief, then vanishes for good long before the State attempts to defend Evans' peremptory strikes—and his credibility—at Flowers' sixth trial.

The State observes that "[d]isparate treatment can certainly be a potential identifier of pretext," but dismisses the disparities here because Evans' "additional questions" to black panelists were merely legitimate follow-up to their "responses during *voir dire*." Resp. Br. 15; *see also id.* at 27 (repeating same claim). That does not begin to address the glaring differences in Evans' treatment of whites and blacks throughout the jury selection process. Evans posed far more questions to struck black panelists than to seated white panelists (a ratio of 29 to 1.1 on average, *see* Pet. Br. 15), thus ensuring there would be much more to pursue with the former group than with the latter.[5] He also

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which they were cited. The State's brief to this Court makes no attempt to refute either point.

[5] This vast disparity in questions posed to black and white panelists produced a record unusually resistant to characteristic-by-characteristic comparisons—the black panelists were examined in detail but the whites were not. Thus, while the State declares with anaphoric flair that "None of the white jurors" shared the litany of characteristics offered to justify striking the black panelists, Resp. Br. 50-51, that claim is dubious at best. Evans did not seek what he did not wish to find, and the conspicuous lopsidedness of the record he created across the length of jury selection is more probative of his real objective than it is of the actual qualifications of the black and white panelists he chose to strike or seat.

exhibited a telling mix of interests and aggressiveness: black panelists acquainted with defense witnesses were questioned extensively while whites with similar relationships were not, *id.* at 45; whites who admitted that they or a relative had been convicted of a crime (some by Evans' own office) were seated without probing, *id.* at 16; 52, while blacks were pursued at length—and later struck—over where they lived, whom they worked with, and whether they had been sued by Tardy Furniture over old credit accounts, *id.* at 46-48; and several black panelists were challenged with extrinsic evidence acquired through out-of-court investigations while no whites were subjected to such treatment, *id.* at 48; 50.

Finally, while the State at least pays lip service to Evans' history and questioning disparities, it says nothing at all about the additional indicators of discriminatory intent. As detailed in Flowers' opening brief, Evans' defense of his strikes featured multiple misrepresentations of the record facts. Pet. Br. 49-51. He also invoked purported concerns about panelists' fitness that were both implausible in the context of the case to be tried and impossible to credit in light of his indifference to other, objectively more serious sources of possible bias. *Id.* at 51-52.

Evans' tactics and behaviors at Flowers' sixth trial—especially when considered in light of the record he amassed in prior trials—"correlate with no fact as well as they correlate with race." *Miller-El*, 545 U.S. at 266. By choosing to ignore most of the indicators of Evans' real intent and refusing to consider them

cumulatively as *Batson* requires, the State does nothing to dissipate the powerful inference of racial motivation compelled by the totality of the record.

CONCLUSION

For these additional reasons, petitioner Flowers respectfully requests that this Court reverse the decision of the Mississippi Supreme Court.

Respectfully submitted,

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